IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1040 OF 2007

Vijaya Zumbar Patil & Anr. ...Petitioners

Versus

Dattatraya Jagannath Dhande & Ors. ...Respondents

Shri Anilkumar Patil for the Petitioners.
Shri M.M.Sathaye for the Respondent No.1.
Shri M.N.Sadashiv for the Respondent No.3.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 27, 2007.

P.C.:

1. Heard Advocates appearing for the parties. On 17th April, 2007 Writ Petition was finally heard. The Writ Petition was kept on 25th April, 2007 to enable the learned counsel for the auction purchaser to take instructions whether the Application at Exhibit 54 filed by the Petitioner is still pending. Accordingly, a statement was made on 25th April, 2007 that the Application was still pending. The Writ Petition was kept today for dictation of judgment. The learned counsel for the third Respondent (auction purchaser) on instructions of his client makes a statement that today an order has been passed by the executing Court on Application at Exhibit 54 by which the said Application has been rejected. The learned counsel for the Petitioner states that the Petitioners are not aware

about this development as the representative of the Petitioners was in Mumbai since 25th April, 2007. The statement made by the learned counsel for the third Respondent is accepted.

2. The challenge in this Petition under Article 227 of the Constitution of India is to three separate orders passed by the learned trial Judge on 18th January, 2007. The first order was passed on Application at Exhibit 67. The said Application was made by the Petitioners under Rule 58 read with Rule 92 of Order XXI of the Code of Civil Procedure, 1908. The said Application was rejected. The second order has been passed on the same day on Application made by the third Respondent at Exhibit 69 by which a sale certificate was ordered to be issued to the third Respondent. The third order has been passed by which an application at Exhibit 65 made by the Petitioner has been rejected. By the said Application an interim relief was sought pending the final disposal of the Application at Exhibit 67.

3. By ad-interim order passed by this Court on 21st February, 2007 it was directed that the sale certificate shall not be issued. The said ad-interim order was extended from time to time and is in force till today.

4. The learned counsel appearing for the Petitioner stated that he has instructions not to press the Application at Exhibit 67 with liberty to prosecute the Application made by the Petitioners at Exhibit 54 under Order XXI Rule 90 of the said Code.

5. The submission of the learned counsel appearing for the Petitioners is that during the pendency of the Application Exhibit 54 which was filed on 04th December, 2006, the learned trial Judge could not have passed an order under Rule 94 of Order XXI granting sale certificate to the purchaser. He submitted that there was no order made under Rule 92 of Order XXI by which the sale in favour of the third Respondent was made absolute. He submitted that the order issuing sale certificate will have to be set aside.

6. The learned counsel for the third Respondent could not dispute that when order dated 18th January, 2007 was passed below Application at Exhibit 69, the Application at Exhibit 54 made by the Petitioners was pending. He, however, submitted that now the Application has been dismissed and therefore, there is no reason to interfere with the said order.

7. I have considered the submissions. Under

sub-rule 1 of Rule 92 of Order XXI of the said Code, the Court is required to make an order confirming the sale and only thereupon the sale becomes absolute. There is a Maharashtra amendment to sub-rule 1 of Rule 92 in the form of proviso to said sub-rule 1. However, we are not concerned with the said amendment at this stage. Sub-rule 1 of Rule 92 provides that the order of confirmation of sale can be made where there is no application made under rule 89, rule 90 or rule 91, or where such Application is made and is disallowed. The order passed below Exhibit 69 does not refer to any order made under sub-rule 1 of Rule 92. The Application at Exhibit 69 discloses that consideration amount has been deposited by the third Respondent on 20th and 21st November, 2006. The auction was held on 04th November, 2006. It is thus obvious that the order under sub-rule 1 of Rule 92 could not have been passed before expiry of period of limitation for filing an Application under Rule 89, Rule 90 or Rule 91. The Application at Exhibit 54 under rule 90 of Order XXI was filed by the first Petitioner on 04th December, 2006. When the order on Exhibit 69 was passed directing that the sale certificate shall be issued to the purchaser, the application at Exhibit 54 was pending. Thus, till 18th January, 2007 when an order on application at Exhibit 69 was passed, there could not have been the confirmation

of the sale. As stated earlier it appears that said order of confirmation of sale has not been passed. An occasion for granting sale certificate under Rule 94 arises only when the sale of immovable property has become absolute. It is thus obvious that as the Petitioners had filed an Application under rule 90 of Order XXI of the said Code on 04th December, 2006, the sale could not have been made absolute unless the said Application was disallowed and consequently, the certificate under Rule 94 could not have been issued. Therefore, the impugned order dated 18th January, 2007 passed below Application at Exhibit 69 deserves to be set aside. A submission was made by the learned counsel for the Petitioners that when this Court was seized of the present Writ Petition, the executiing Court has hurriedly decided the Application at Exhibit 54. Prima facie, there is some merit in the submission. However, the said contention will have to be raised in appropriate proceedings filed for challenging the order passed below Exhibit 54.

8. Hence, the order below Exhibit 69 deserves to be set aside. The Advocate for the Petitioners has stated that the Petitioners are not pressing the application at Exhibit 67. Therefore, challenge to orders below Exhibit 64 and 67 does not survive.

9. Hence, I pass the following order:

(i) As the Petitioners have not pressed the Application at Exhibits 65 and 67, the orders passed below the said Applications are not disturbed.

(ii) The order dated 18th January, 2007 passed below Application at Exhibit 69 is quashed and set aside and the Application at Exhibit 69 is restored to the file.

(iii) It will be open for the Petitioners to take out appropriate proceedings for challenging order passed below application at Exhibit 54. To enable the Petitioners to take out appropriate proceedings, no order shall be passed below Application at Exhibit 69 by the executing Court for a period of eight weeks from today. The executing Court will permit the Petitioners to file a reply to the said Application at Exhibit 69 before passing order thereon.

(iv) All contentions of the parties on merits of the Application at Exhibit 54 are kept expressly

open.

(v) For the time being, the executing Court will invest the amount deposited by the third Respondent in fixed deposit in any nationalised bank initially for a period of four months. The trial Court will be entitled to pass appropriate order regarding premature enhancement of the fixed deposit or renewal of the fixed deposit, as the case may be.

(vi) Writ Petition is partly allowed in above terms.

JUDGE